

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BETTY J. FOSTER</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>JC PENNEY CO., INC.</b>	)	
Respondent	)	Docket No. 1,029,883
	)	
AND	)	
	)	
<b>AMERICAN HOME ASSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the November 14, 2008 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on March 4, 2009.

**APPEARANCES**

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. John B. Rathmel, of Merriam, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that while the Award failed to list the report of Dr. Peele's Independent Medical Examination which occurred on July 20, 2007, his report should be considered part of the record.

**ISSUES**

The ALJ awarded claimant a 15 percent functional whole body impairment based solely upon the opinions expressed by Dr. Sergio Delgado, a physician retained by claimant. In doing so, the ALJ expressly disregarded the opinions offered by Dr. Peele, the

independent medical examiner, as he concluded there was no evidence that Dr. Peele's opinions were based upon the *Guides*<sup>1</sup> as required by the Kansas Workers Compensation Act.<sup>2</sup>

The respondent requests review of the nature and extent of claimant's disability, arguing that the Board should reverse the ALJ's decision and appropriately consider the IME report of Dr. Peele. Respondent maintains that once Dr. Peele's opinions are considered, the Board should deny claimant permanent benefits as Dr. Peele has indicated claimant bears no permanent impairment as a result of her work activities.

Claimant argues that the ALJ should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is but a single issue to be decided in this appeal, the nature and extent of claimant's permanent impairment. At the prehearing settlement conference, the ALJ decided to appoint a neutral physician to assess claimant's need for further treatment.<sup>3</sup> If no further treatment was warranted, that same order directed the physician to assign a permanent impairment consistent with the principles set forth in the 4<sup>th</sup> edition of the *Guides* as required by K.S.A. 44-510e(a).

Dr. Robert M. Peele, an orthopaedic physician, issued his report on July 20, 2007 and opined that claimant did not require further treatment for what he diagnosed as a right shoulder strain with preexisting mild foraminal osteophyte and nerve root irritation. He went on to opine that she was at maximum medical improvement and "[t]oday the patient does not have any partial/permanent impairment."<sup>4</sup> His deposition was not taken and there is no mention within this report of the *Guides* or the criteria upon which he based his opinion(s). And it is worth noting that the first sentence of his report indicates that he was asked to see claimant "for an Independent Medical Evaluation relative to her right

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>2</sup> K.S.A. 44-510e(a) and K.S.A. 44-510d(a)(23).

<sup>3</sup> This Order was directed to Midlands Orthopaedics, P.A. a group of physicians located in Columbia, South Carolina, where claimant presently resides. Dr. Peele is one the physicians in that group.

<sup>4</sup> Peele's IME Report at 2 (dated July 20, 2007).

shoulder.”<sup>5</sup> Thus, while he noted claimant’s neck complaints, he did not rate those complaints.

In contrast to this report are the opinions of Dr. Sergio Delgado, a retired orthopaedic surgeon, who examined claimant in November 2007 at the request of her attorney. Dr. Delgado concluded, based upon his clinical examination, that claimant suffers not from a shoulder problem, but rather from a right cervical root irritation with neurological deficit which is causing her neck and shoulder complaints. Dr. Delgado went on to rate claimant’s condition in the DRE cervicothoracic category III which yields a 15 percent permanent partial whole body impairment. However, Dr. Delgado’s report is somewhat equivocal in that he does not seem to believe she was at maximum medical improvement as of the time of his examination, due in part to the lack of diagnostic testing.

Right cervical root irritation which has not been sufficiently defined as no electromyographic studies have been performed. However, clinically, she appears to have cervical radiculopathy involving the periscapular musculature mostly with some radiation into the arm. I do not see any evidence of shoulder pathology.<sup>6</sup>

Dr. Delgado goes on to conclude that “[b]ased upon AMA Guides to the Evaluation of Permanent Impairment, fourth edition, *if she has reached maximum medical improvement*, she would be rated at a 15% whole person impairment based on the criteria from Diagnostic Related Estimate, Cervicothoracic Category III.”<sup>7</sup>

Following the Regular Hearing the ALJ succinctly summarized the issue and his conclusion as follows:

The court has before it two opinions on [c]laimant's functional impairment. Dr. Sergio Delgado opined that [c]laimant had suffered a 15% impairment of function to the body as a whole, and premised his rating opinion on the **Guides**. Dr. Peele, an orthopaedic surgeon in South Carolina examined [c]laimant as part of an Independent Medical Examination as to the need for additional treatment. Dr. Peele also offered an opinion on [c]laimant's functional impairment, but did not refer to the Guides or explain what criteria he considered or relied upon in arriving at his rating opinion. **K.S.A. 44-510d(a)(23)** [scheduled injuries] and **44-510e(a)** [whole body injuries] each require that an impairment rating be based "on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein." As there is no evidence before

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<sup>5</sup> *Id.* at 1.

<sup>6</sup> Delgado Depo., Ex. 2 at 4 (Nov. 28, 2007 report).

<sup>7</sup> *Id.* at 5 (emphasis added).

the court that Dr. Peele's opinion was based on the **Guides**, it will not be considered. Claimant has suffered a 15% whole body functional impairment.<sup>8</sup>

Respondent takes issue with this Award. Respondent maintains that there is “proof”<sup>9</sup> that Dr. Peele adhered to the principles set forth in the **Guides**. First, respondent maintains that the simple fact that Dr. Peele accepted the appointment to perform the IME exam evidences the physician's compliance with the court's directive to rate pursuant to the *Guides*. Second, there is nothing within the report that suggests that Dr. Peele *did not* use the *Guides* during his evaluation of claimant's condition. Third, respondent argues that nothing within the Act compels the court-ordered physician to “regurgitate the terms of their appointment in written form in their reports of examination to qualify their reports to be considered as credible evidence.”<sup>10</sup> To the contrary, K.S.A. 44-516 compels the ALJ to consider the independent medical examiner's report in making his final determination. Respondent contends that “Judge Moore had no statutory option to refuse to consider his own neutral physician's opinion in making his decision in this claim.”<sup>11</sup>

Although it is true that Dr. Peele accepted the appointment to perform the IME, there are some indications that he did not follow the directions contained within the ALJ's Order directing him to perform the IME. For example, the first line of his report indicates that he is to examine her right shoulder, clearly evidencing his intention to consider only the shoulder and not her neck complaints. The Order from the ALJ did not limit the scope of his examination, so it is difficult to know why Dr. Peele made this statement. It is true that he makes some comment with respect to claimant's neck but he makes no diagnosis concerning the neck and, he nonetheless issues a zero percent rating to her shoulder only. Under these circumstances, the Board is unwilling to assume that his opinions are based upon the appropriate edition of the *Guides* as required by statute.

Rather, the Board finds that, in the interest of justice<sup>12</sup>, the Award should be set aside and the entire matter remanded to the ALJ. Dr. Peele was the court-ordered IME and by statute, his report must be considered.<sup>13</sup> It would be inherently unfair to allow an ALJ to disregard a court-ordered IME report when, by statute, the report is automatically considered part of the record and the ALJ is statutorily compelled to consider its contents when the report is silent as to whether it was rendered pursuant to the *Guides*. At a

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<sup>8</sup> ALJ Award (Nov. 14, 2008) at 5.

<sup>9</sup> Respondent's Letter Brief at 1-2 (filed Jan. 8, 2009).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

<sup>13</sup> K.S.A. 44-510e(a) and K.S.A. 44-516.

minimum, the physician should be asked to clarify whether his opinions complied with the ALJ's Order and the statutory requisites.

Accordingly, the ALJ is respectfully requested to contact Dr. Peele and ask him to clarify 1) whether he purposefully limited his examination to just the shoulder, contrary to the terms of the IME Order and 2) whether his opinion on impairment was rendered in a manner consistent with the 4<sup>th</sup> edition of the *Guides*. With that clarification, the ALJ can then consider Dr. Peele's report and make his findings with respect to the nature and extent of claimant's impairment.

As an aside, the Board noted an issue with respect to Dr. Delgado's opinion. As noted above, Dr. Delgado opined that claimant suffers from a right cervical root irritation but that condition had yet to be confirmed by diagnostic testing. In his report he went on to opine that "if" claimant had reached maximum medical improvement, she would be rated at 15 percent. In essence, Dr. Delgado has speculated upon claimant's impairment based upon a clinical finding that has yet to be confirmed by a diagnostic test. Claimant has not sought this additional testing but it does pose a concern when Dr. Delgado is rating claimant when, by his own words, it seems he is not certain of his diagnosis and unlikely that she is truly at maximum medical improvement. Nonetheless, neither party has not raised this issue and claimant is not seeking additional medical treatment so the Board will not address this aspect of the claim.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 14, 2008, is set aside and the entire case is remanded to the ALJ for further proceedings consistent with the findings set forth above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeffery K. Cooper, Attorney for Claimant  
John B. Rathmel, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge